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In the Supreme Court of the United States

TEXAS WATER DEVELOPMENT BOARD,
Petitioner,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

GREG ABBOTT
Attorney General of Texas

C. ANDREW WEBER
First Asst. Attorney General

DAVID S. MORALES
Deputy Attorney General for Civil Litigation

BARBARA B. DEANE
Assistant Attorney General
Chief, Envtl. Prot. & Admin. Law Div.

DAVID PREISTER
Assistant Attorney General
Chief, Envtl. Prot. Section

THOMAS H. EDWARDS
Assistant Attorney General
Counsel of Record

P.O. Box 12548
Austin, Texas 78711
(512) 463-2012

TABLE OF CONTENTS

Table of Authorities ii

Introduction 1

Argument 3

I. This Case Affords the Court an Opportunity To Resolve a Circuit Split. 3

II. Contrary to Respondents' Assertion, the Fifth Circuit's Decision Here Is Not Fact Bound. 7

Conclusion 10

TABLE OF AUTHORITIES

Cases

Catron County Bd. of Comm'rs v. *U.S. Fish & Wildlife Serv.*, 75 F.3d 1429 (CA10 1996) 1-5, 7, 10

City of Dallas v. *Hall*, 562 F.3d 712 (CA5 2009) 2, 6, 8, 9

Douglas County v. *Babbitt*, 48 F.3d 1495 (CA9 1995) 2, 4, 5, 7

Nat'l Ass'n of Prop. Owners v. *United States*, 499 F. Supp. 1223 (D. Minn. 1980), *aff'd sub nom. Minnesota* v. *Block*, 660 F.2d 1240 (CA8 1981) 5

Sabine River Auth. v. *U.S. Dep't of Interior*, 951 F.2d 669 (CA5 1992) 2, 5, 6, 9

Thompson v. *Keohane*, 516 U.S. 99 (1995) 7

Statutes, Rules, and Regulations

16 U.S.C. § 1531, *et seq.* 4

40 C.F.R. § 1508.9 2

42 U.S.C. § 4332(2) 10

42 U.S.C. § 4332(2)(C) 2, 8

S. CT. R. 10 3

S. CT. R. 10(a) 2, 7

Other Authorities

Ben W. Alderton,
Note, *Must NEPA Always Be Followed to the Letter When Obtaining an Environmental Assessment To Acquire a Conservation Easement? After All, Aren't We Maintaining the Environmental Status Quo?*,
19 J. NAT. RESOURCES & ENVTL. L. 193 (2004-05) . . . 7

Jean M. Emery,
Comment, *Environmental Impact Statements and Critical Habitat: Does NEPA Apply to the Designation of Critical Habitat Under the Endangered Species Act?*,
28 ARIZ. ST. L.J. 973 (1996) 6

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INTRODUCTION

In opposing the Texas Water Development Board's (TWDB) petition for writ of certiorari, Respondents offer two main reasons for the Court to deny review. First, they claim that, contrary to TWDB's argument, the Fifth Circuit's decision in this case is not in conflict with *Catron County Board of Commissioners* v. *United States Fish and Wildlife Service*, 75 F.3d 1429 (CA10 1996) (*see* B.I.O. 16-18, ¶ 4). Second, they attempt to downplay the importance of the Fifth Circuit's decision here by asserting that it is

entirely "fact bound" (*see id.*, at 8; 9, ¶ 1(a); & 18, ¶ 4). Neither of Respondents' claims, however, has merit.

Regarding conflict, *Catron County* holds, among other things, that the National Environmental Policy Act's (NEPA) documentation requirements, 42 U.S.C. § 4332(2)(C), 40 C.F.R. § 1508.9, *et al.*, are triggered even though federal action designating a critical-habitat boundary does not change the natural, physical environment. *See Catron County*, 75 F.3d, at 1436-37. That decision conflicts with the Fifth Circuit's decision here—that NEPA's documentation requirements are *not* triggered by federal action setting an acquisition boundary for a wildlife refuge that preserves the physical environment. *See City of Dallas* v. *Hall*, 562 F.3d 712, 723 (CA5 2009) (TWDB App'x 95-96); *see also Sabine River Auth.* v. *U.S. Dep't of Interior*, 951 F.2d 669, 680 (CA5 1992) (same). Not only does the Tenth Circuit's decision in *Catron County* conflict with the Fifth Circuit's decision here, it conflicts with a decision of the Ninth Circuit, too. *See Douglas County* v. *Babbitt*, 48 F.3d 1495, 1505 (CA9 1995) ("NEPA procedures do not apply to federal actions that do nothing to alter the natural physical environment."). Thus, there is a circuit split among the Tenth, Ninth, and Fifth Circuits on the same important matter of federal law. TWDB's petition should be granted in order to resolve this split. *See* S. CT. R. 10(a).

Respondents' attempt to characterize the court of appeals decision as "fact bound" is similarly unpersuasive. TWDB's petition raises legal issues that do not involve mere challenges to erroneous factual findings. The decision below is not just fact specific to this case. Rather, this case broadly asks whether NEPA's documentation

requirements must be performed when: (1) the planning horizon of a state or local water-development plan that affects certain lands and water resources exceeds the planning horizon of a competing federal project concerning those same resources; (2) a competing state water project concerns only a proposed reservoir, instead of an existing reservoir; or (3) the designation of a wildlife-refuge boundary and acceptance of a negative conservation easement do not alter the physical environment. These are legal questions. Their proper resolution affects important state and federal interests and is a compelling reason for granting review. *See* S. Ct. R. 10.

Argument

I. This Case Affords the Court an Opportunity To Resolve a Circuit Split.

Respondents argue that the Fifth Circuit's decision in this case does not conflict with the Tenth Circuit's decision in *Catron County* (B.I.O. 16, ¶ 4). They claim that *Catron County* is distinguishable from this case (*id.*, at 16-18, ¶ 4). They are wrong.

Respondents assert that "the only question at issue in *Catron County* was whether the agency's action was entirely exempt from NEPA's requirements" and that the Tenth Circuit "had no occasion to consider when an agency proceeding in accordance with NEPA need not undertake an EIS [environmental impact statement]" (*id.*, at 17, ¶ 4). They claim that the Fifth Circuit's decision here is distinguishable from, and therefore not in conflict with, *Catron County* because they have "never contended that NEPA does not apply to the designation of the refuge" (*ibid.*).

This facile distinction, however, does not withstand scrutiny. In both *Catron County* and *City of Dallas*, a critical question was whether a federal agency's noncompliance with NEPA's documentation requirements may be excused for federal "actions" that preserve, as opposed to change or alter, the physical environment. The Fifth Circuit in this case and the Tenth Circuit in *Catron County* decided the same legal issue differently.

In *Catron County*, the U.S. Fish and Wildlife Service (FWS) designated 74 miles of river habitat as critical habitat for the spikedace and loach minnow under the Endangered Species Act (ESA), 16 U.S.C. § 1531, *et seq.* *See* 75 F.3d, at 1433. The County alleged "that designation of critical habitat would prevent the diversion and impoundment of water by the County, thereby causing flood damage to county-owned property[.]" *Ibid.* The County argued that the designation was improper because FWS had failed to comply with NEPA's documentation requirements, among other things. *Ibid.* FWS, however, responded that its noncompliance with NEPA was excused because ESA's procedures "essentially duplicate the NEPA inquiry" and "displace[d]" NEPA's procedural and informational requirements, and because Congress had endorsed prior judicial and FWS announcements of NEPA noncompliance in conjunction with actions pursuant to the ESA. *See id.*, at 1435-38. To support its argument, FWS relied upon *Douglas County* v. *Babbitt*, 48 F.3d, at 1495.

In *Douglas County*, the Secretary of the Interior designated certain federal land as critical habitat for the Northern Spotted Owl under the ESA. *See id.*, at 1497. In so doing, the Secretary announced that compliance with NEPA's documentation requirements—an environmental

assessment (EA) and an environmental impact statement (EIS)—was not needed. *See id.*, at 1497-98. The district court, however, granted summary judgment for the County, concluding that NEPA applied to the designation of critical habitat and the Secretary had failed to comply with the statute. *See id.*, at 1499.

On appeal to the Ninth Circuit, intervenors in the district court "argue[d] that an EIS [wa]s not required because the federal action at issue d[id] not change the natural, physical environment[.]" *Ibid.* The Ninth Circuit agreed, holding that "NEPA procedures do not apply to federal actions that do nothing to alter the natural physical environment." *Id.*, at 1505. In so holding, the Ninth Circuit observed that other courts had reached the same conclusion. *Id.*, at 1505-06 (citing *Sabine River*, 951 F.2d, at 680; *Nat'l Ass'n of Prop. Owners* v. *United States*, 499 F. Supp. 1223, 1265 (D. Minn. 1980), *aff'd sub nom. Minnesota* v. *Block*, 660 F.2d 1240 (CA8 1981)). In both cases cited by the Ninth Circuit, the courts viewed the federal agency's "'action' . . . as tantamount to 'inaction'" not requiring an EIS. *Sabine River*, 951 F.2d, at 680; *see Nat'l Ass'n of Prop. Owners*, 499 F. Supp., at 1265 (EIS is not required "in order to leave nature alone.").

The Tenth Circuit in *Catron County*, however, expressly disagreed with the Ninth Circuit's decision in *Douglas County*. *See* 75 F.3d, at 1436 ("We disagree with the panel's reasoning."). The Tenth Circuit clearly believed that designating critical habitat does not constitute "inaction." *See ibid.* ("[W]e likewise disagree with the [Ninth Circuit] that no actual impact flows from the critical habitat designation."). The Tenth Circuit held that, even though a designation of critical habitat under the

ESA preserves the physical environment, that fact did not excuse the federal agency's noncompliance with NEPA's documentation requirement. *See id.*, at 1436-38.

The Fifth Circuit's decision in this case holds that FWS's establishment of an acquisition boundary for the Neches River Wildlife Refuge in East Texas (the Refuge) and acceptance of conservation easements for the Refuge "does not effect any change in the physical environment," is "'tantamount to inaction,'" and "will have no significant physical effects such that an EIS is required." *City of Dallas*, 562 F.3d, at 723 (TWDB App'x 95-96) (quoting *Sabine River*, 951 F.2d, at 680). Unlike the Tenth Circuit in *Catron County*, the Fifth Circuit views actions that preserve the physical environment to limit NEPA's reach. The Fifth Circuit's decision, therefore, directly conflicts with the decision in *Catron County* on the same matter of federal law.

These two decisions—in addition to the Ninth Circuit's decision in *Douglas County* and the Fifth Circuit's other decision in *Sabine River*—are irreconcilable. They therefore create nonuniformity among the federal courts on an important issue of statutory interpretation and national environmental policy. *See* Jean M. Emery, Comment, *Environmental Impact Statements and Critical Habitat: Does NEPA Apply to the Designation of Critical Habitat Under the Endangered Species Act?*, 28 ARIZ. ST. L.J. 973, 1005-06 (1996) (discussing conflict among Ninth, Tenth, and Fifth Circuits concerning whether a habitat designation triggers EIS requirement under NEPA); *see also* Ben W. Alderton, Note, *Must NEPA Always Be Followed to the Letter When Obtaining an Environmental Assessment To Acquire a Conservation Easement? After*

All, Aren't We Maintaining the Environmental Status Quo?, 19 J. NAT. RESOURCES & ENVTL. L. 193, 200-01 (2004-05) (describing question left open by *Sabine River* as to whether a negative conservation easement triggers NEPA at all, noting that the issue has arisen in the context of the designation of critical habitat under the ESA where the environmental *status quo* is maintained, and discussing *Douglas County* and *Catron County*). Because uniformity among federal courts regarding the proper interpretation of a wide-ranging federal statute is important, certiorari review is warranted here. S. CT. R. 10(a); *see. Thompson* v. *Keohane*, 516 U.S. 99, 106 (1995) (certiorari granted where circuits disagreed on proper application of federal statute).

II. CONTRARY TO RESPONDENTS' ASSERTION, THE FIFTH CIRCUIT'S DECISION HERE IS NOT FACT BOUND.

Besides denying that a circuit split exists, Respondents also assert that "review is not warranted" in this case because the Fifth Circuit's decision is "fact bound" (B.I.O. 8). Respondents claim that the determination that FWS acted neither arbitrarily nor capriciously in crafting its EA, issuing a finding of no significant impact, and not performing an EIS when establishing the Refuge is a "fact-bound conclusion" (B.I.O. 8; 9, ¶ 1(a); & 18, ¶ 4). Not so. TWDB's petition points to several purely legal questions that are implicated in this case and that were decided erroneously by the Fifth Circuit.

For one thing, TWDB argued that just because a state or local public-works project affecting the human environment has a relatively long planning horizon and distant start date does not excuse a federal agency from preparing an EIS for a competing federal project that

involves the same natural resources and is set to develop sooner than the opposing state or local project (*see* TWDB's Pet. for Writ of Cert. 20, 28, 29, 30). The Fifth Circuit rejected this argument. It held that FWS's noncompliance with NEPA's documentation requirement was excused, in part, because the State's 50-year water planning process and its plans for developing Lake Fastrill were too far beyond FWS's planning horizon for the Refuge. *City of Dallas*, 562 F.3d, at 718, 719 (TWDB App'x 86, 88). In essence, the court believed that a federal project with a shorter planning horizon trumps a competing state or local project with a longer one. This holding announces a virtually *per se* rule favoring federal agencies.

Whether preparation of an EIS may be avoided, simply because a proposed major federal action affecting the physical environment will occur sooner than a competing state or local project, is a legal question. The Fifth Circuit has declared a broad principle of general applicability concerning NEPA's provisions. Its holding is not merely that the district court properly applied the facts in this case; rather, it represents a judicial determination of the meaning of the term "major Federal actions" in 42 U.S.C. § 4332(2)(C). Because of its statutory interpretation, the court held that an EIS was not needed. This conclusion was not fact bound; it necessarily involved a legal determination. TWDB's petition for writ of certiorari challenges this legal conclusion.

Another legal issue raised by this case is whether FWS's nonperformance of an EIS was excused because the State's and the City of Dallas's proposal for establishing Fastrill Reservoir was still only in a long-range planning phase (TWDB's Pet. for Writ of Cert. 20, 31-32). The Fifth Circuit

held that FWS was not required to analyze the effect of establishing the Refuge on city and state plans for Lake Fastrill, because the proposed reservoir was not an *existing* water source. *City of Dallas*, 562 F.3d, at 719 (TWDB App'x 87).

Deciding whether the Fifth Circuit's existing-versus-proposed distinction is valid under NEPA is a legal determination. The issue of existing versus proposed is not a fact-intensive inquiry. It is a straightforward question of law requiring a policy decision by judges.

Further demonstrating the legal character of this determination, one can easily imagine alternate scenarios involving other existing or potential future federal actions that threaten other types of proposed and as-yet nonexistent state or local public-works projects, not just water-reservoir projects as in this case. As with the first issue discussed, the Fifth Circuit's decision on this second issue is not fact bound—it calls for a legal determination.

Finally, as discussed in section I, *supra*, this case presents a third legal issue—whether designating a refuge boundary and accepting a conservation easement is a major federal "action" triggering NEPA's documentation requirements, or is instead merely "inaction" that excuses the nonperformance of an EIS. The Fifth Circuit held that such activities "do[] not effect any change in the physical environment," and are "'tantamount to inaction.'" *City of Dallas*, 562 F.3d, at 723 (TWDB App'x 95-96) (quoting *Sabine River*, 951 F.2d, at 680). Accordingly, the court concluded that there was no "'major Federal action[] significantly affecting the quality of the human environment,' 42 U.S.C. § 4332(2), and no EIS is necessary under the requirements of NEPA." *Ibid.*

As with the two preceding issues, this issue involved a legal determination. The court interpreted the meaning of NEPA's "major Federal actions" language in § 4332(2) to reach its ultimate conclusion that no EIS was required here. This was not simply a fact-bound conclusion unique to only this case. It involved a question of statutory interpretation, which is, of course, a question of law. What is more, the Fifth Circuit's interpretation is not inevitable. As already mentioned above, the Tenth Circuit has interpreted § 4332(2) differently from the Fifth Circuit. *See Catron County*, 75 F.3d, at 1436-38. Accordingly, review is warranted in this case to resolve this and other legal issues presented in TWDB's petition for writ of certiorai.

CONCLUSION

TWDB's petition for writ of certiorari should be granted.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

C. ANDREW WEBER
First Assistant Attorney General

DAVID S. MORALES
Deputy Attorney General for Civil Litigation

BARBARA B. DEANE
Assistant Attorney General
Chief, Envt'l Prot. & Admin. Law Div.

DAVID PREISTER
Assistant Attorney General
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THOMAS H. EDWARDS
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Counsel of Record

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